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Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

RAMON PORTALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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May 2003

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QUESTION PRESENTED

Does the Fourth Amendment require that police obtain a warrant before opening an opaque package seized in plain view (but not from an automobile), even if there is probable cause to believe the package contains drugs?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Portales and respondent United States). Petitioner knows of no related cases.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ramon Portales respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit affirming his conviction and sentence for marijuana related offenses.

OPINIONS BELOW

The Seventh Circuit's non-precedential opinion (denominated an "order") (per curiam, panel of Ripple, Manion and Evans, JJ.), was filed November 22, 2002. It is available at 52 Fed.Appx. 290 and 2002 WL 31688920. A copy is attached as Appendix A. The oral decision of the United States District Court for the Northern District of Illinois (Gettleman, J.), denying petitioner's pretrial motion to supress, rendered February 7, 2000, is not published. A copy is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction and sentence on marijuana charges was filed and entered on November 22, 2002. Appx. A; see *United States v. Portales*, 52 Fed.Appx. 290, 2002 WL 31688920. The petitioner's timely petition for rehearing was denied by the Seventh Circuit on February 5, 2003. Appx. C. The petition is being filed by postmark on or before the

90th day thereafter. Rules 13.1, 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

STATEMENT OF THE CASE

Petitioner Ramon Portales was convicted after a one-day bench trial, following a four-day initial trial which ended in a hung jury, in the Northern District of Illinois, on marijuana charges. On appeal, he unsuccessfully challenged the denial of his pretrial motion to suppress evidence on Fourth Amendment grounds.

a. *Procedural History*

A two-count superseding indictment returned in June 1999, charged petitioner Ramon Portales, a legal immigrant from Mexico who had become a modestly successful businessman and farmer, with marijuana offenses. CA7 App. 20-28. Count One charged that from in or about August 1998 until January 26, 1999, defendants Noe Lugo, Ramon Portales, Ruben Rodriguez, Gordiano Lugo and Juan de los Santos conspired

with each other and with others, in violation of 21 U.S.C. § 846, to possess with intent to distribute "mixtures containing marijuana" (in an unspecified quantity), contrary to *id.* § 841(a)(1). Count Two charged the substantive offense of possession with intent to distribute "approximately" 2920 pounds (over 1327 kilograms) of marijuana, in violation of *id.* § 841(a)(1) and 18 U.S.C. § 2(a) (aiding and abetting). The indictment also contained forfeiture allegations under 21 U.S.C. § 853.

On November 19, 1999, Mr. Portales filed a motion to suppress physical evidence seized January 26, 1999. On two days in February 2000, the district court conducted an evidentiary hearing. At the conclusion of the hearing, the court (Robert W. Gettleman, J.) heard extensive argument, and then ruled from the bench, with findings and conclusions, denying the motion. Appx. B.

Trial before Judge Gettleman and a jury as to petitioner Portales and one co-defendant, Ruben Rodriguez, began on May 8, 2000. Testimony was heard for two days, before the trial was recessed on account of Mr. Portales' sudden hospitalization with an accidentally broken neck. Judge Gettleman held the jury in service, and trial resumed upon Mr. Portales's release from the hospital two weeks later. After another four days of trial, the jury deliberated for two days and declared a deadlock. The court then declared a mistrial as to both defendants.

After several continuances, the retrial for the two defendants to the bench occurred on May 17, 2001. The parties incorporated the record of the first trial, and petitioner Portales testified. The parties filed post-trial memoranda a legal issue, and then closing arguments were heard on May 30, 2001. Judge Gettleman rendered

his verdict on June 1.[1] The court acquitted co-defendant Rodriguez, but convicted petitioner Portales on both counts and remanded him to custody.

Following litigation of several sentencing issues, the court sentenced petitioner on November 1, 2001, to serve 120 months' imprisonment concurrently on each count, the mandatory minimum term under 21 U.S.C. § 841(b)(1)(A), to be followed by five years' supervised release, and to pay a $5000 fine and the required $200 in special assessments.

Represented by new (undersigned) counsel, petitioner appealed to the U.S. Court of Appeals for the Seventh Circuit, pursuing the issue of denial of the pretrial motion to suppress and two questions about the sentencing. On November 22, 2002, the court of appeals filed its "order" (per curiam) affirming petitioner's convictions and sentence. Appx. A. Petitioner sought rehearing, pointing out that the panel had affirmed the denial of the suppression order on a ground not even advanced by the government in its appellate brief or argument, and which was patently incorrect as a matter of constitutional law. The court directed that an answer to the petition be filed, but the panel then denied rehearing.[2] Appx. C.

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[1] As part of the stipulation to waive a jury for the retrial, the parties agreed that the court would not render specific findings and conclusions under Fed.R.Crim.P. 23(c).

[2] The government hand-filed its answer to the petition (after obtaining an extension of time), but served it on the appellant (petitioner) only by ordinary mail, which did not arrive in counsel's office for more than a week. The answer did not defend the decision on the grounds rendered, but only claimed

This petition follows.

b. ***Statement of Facts***

On five occasions between August 1998 and January 1999, Seferino De Los Santos,[3] a convicted burglar and long-time drug addict, drove a semi-tractor trailer from Texas to the Chicago area. The truck featured a secret compartment loaded with marijuana. Seferino was recruited for this job by his brother, Juan De Los Santos, who was working with Antónia García and a man Seferino knew as "Raffa." Tr. 326-27. Seferino was paid between $40,000 and $50,000 for each of the first four trips, which he split (unevenly) with his brother, Juan. Tr. 329, 352, 382, 399, 413.

In January 1999, Seferino and his cousin made their final trip to Chicago. Tr. 413. En route, the truck's secret cargo was discovered at a weigh station in Joplin, Missouri. Tr. 415. State Highway Patrol officer Mark Cooper crawled into the compartment, partially unwrapped one of the bundles, and confirmed that it contained marijuana. He then re-wrapped the bundle, put it back where it came from in the truck and re-sealed the compartment. Seferino and his cousin agreed to

_____(cont'd)

that rehearing should be denied because the government was right on the merits for other, unrelated reasons. Although petitioner immediately prepared and express-delivered a reply pointing out that this was grounds to grant, not to deny, rehearing (at least by the panel), the court of appeals had denied the petition by the time the reply arrived.

[3] Seferino De Los Santos is referred to in this petition by his first name to distinguish him from his brother, co-conspirator Juan De Los Santos.

participate in a controlled delivery of the marijuana. Tr. 415-17 (Seferino). When Seferino, his cousin, and Trooper Cooper reached Chicago, Seferino was turned over to DEA Agent Robert Rodriguez, who would participate in the controlled delivery, posing as Seferino's cousin. Tr. 417-18. In preparation for the delivery, Seferino showed Agent Rodriguez the pallet warehouse and farm owned by petitioner, and the truck stop from which he usually called his brother. Tr. 418. Seferino and Agent Rodriguez then drove the semi to the truck stop, where Seferino called his brother, waited for his brother to get instructions, and then called his brother again. Tr. 419.

At Juan's direction, Seferino and Agent Rodriguez drove the semi to the pallet company warehouse. Tr. 420. When the reached the pallet warehouse, however, co-conspirator Noe Lugo explained that the semi could not be unloaded at the farm, because there had been a flood. Tr. 451.

The next morning, January 26, 1999, Lugo and petitioner arrived at the pallet company warehouse in a Ford flatbed truck that was loaded with lumber. Tr. 137. Petitioner went into the warehouse and began stacking up pallets near the loading dock to which the semi containing the marijuana had been backed up. Tr. 140. After the piles of pallets reached approximately ten feet in height, petitioner used a forklift to remove pallets of limes from the semi. Tr. 142, 146.

By 11:50 a.m., petitioner had finished unloading the pallets of limes. Tr. 152. After the limes had been unloaded, Lugo and several other men went into the semi's trailer to open the secret compartment. Tr. 153-54. During this time, petitioner unloaded the lumber

from the flatbed truck and then had a conversation with Noe Lugo in the parking lot, after which Lugo drove off in the red Dodge pickup. Tr. 153-54. While Lugo was gone, petitioner used his cell phone to make calls in the parking lot. Tr. 154.

After Lugo returned, petitioner used the forklift to carry three rough crates into the semi's trailer. Tr. 157. Later, he used the forklift to remove those crates from the trailer and place them back in the warehouse. Tr. 159. Agents conducting surveillance could see the crates being taken into the warehouse, but could not see what was in them. Tr. 159. At that point, the agent in charge gave the signal to enter and arrest. Tr. 160.

In the warehouse, the agents found an open cooler filled with cash in clear plastic bags. Tr. 167. On a pile of pallets next to the cooler was a plugged-in heat-sealing device, plastic bags, and two bundles of currency. Tr. 296-97. The agents seized the cooler, which contained $334,580 in currency. Tr. 303. Through spaces between the slats of the crates, the agents could see block-shaped bundles wrapped in colored paper, which from their smell and shape, the agents believed contained marijuana. Tr. 170-71. The agents seized the crates and (without a warrant) examined the contents of the paper-wrapped packages contained in the crates, which turned out to be nearly 3,000 pounds of marijuana. Tr. 314.

Petitioner admitted at trial that he unloaded crates containing marijuana on January 26, 1999, and did not deny that marijuana had been delivered to his farm in the past. Second Trial Tr. 65. He claimed, however, that until shortly before he removed the marijuana from the trailer that day, he was unaware either that the trailer contained marijuana or that Lugo and others had used

his farm as a delivery point for marijuana shipments. Tr. 1226, 1232-35.

Petitioner testified at trial that he participated in unloading the crates of marijuana on January 26, 1999, under duress. The parties agreed to a general verdict without specific findings, but from his comments at sentencing it appears that Judge Gettleman did not credit this testimony.

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court for the Northern District of Illinois had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASON FOR GRANTING THE WRIT

The Seventh Circuit's ruling in this case conflicts with numerous decisions of this Court and of every other Circuit on the issue of whether a warrant must be obtained before opening a package seized in "plain view," even upon probable cause to believe it contains drugs, when the package was not seized from an automobile.

The courts below upheld the denial of petitioner's pretrial motion to suppress evidence on an indefensible basis -- that probable cause to believe an opaque package contains drugs is enough to justify a warrantless search of that package, simply because the package itself was seized in plain view. This Court's cases, as consistently announced over the past 20 years and more, hold the opposite. A summary reversal of the lower court's disposition is warranted.

At trial, DEA Agent Robert A. Rodriguez testified that crates seized during a warrantless search of the RPI Pallet Company warehouse contained marijuana in opaque, paper-wrapped packages. Tr. 167-68. The opening and search of this crate of paper packages violated petitioner Ramon Portales's Fourth Amendment right to be free from unreasonable searches and seizures. The district court ruled that because the paper-wrapped packages of marijuana were in plain view through openings in the sides of the crates which held them when the agents entered the warehouse to make arrests, the contraband contained in those packages was admissible in evidence. Appx. B. The court below affirmed, holding that "where police conclude, based on a 'practical, nontechnical probability,' that a package in plain view

contains illegal drugs, they may seize and open that package without a warrant." Appx. A, at 3, quoting *United States v. Thornton*, 197 F.3d 241, 249 (7th Cir. 1999).[4]

The decision below is completely erroneous under settled Fourth Amendment law. When government agents observe an opaque package in plain view, they may seize it if they have probable cause to believe it contains contraband. *United States v. Jacobsen*, 466 U.S. 109, 121-22 (1984) ("it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe a container conceals contraband"). Nevertheless, they may not proceed to open that package or container without a warrant, no matter how strong the probable cause may seem, simply because it was properly seized, upon probable cause, in plain view. *Id.* at 114 ("Even when government agents may lawfully seize ... a package to protect loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.") (footnote omitted).

Other circuits have recognized and applied the correct rule on any number of coccasions. See, *e.g.*, *United States v. Doe*, 61 F.3d 107, 111 (1st Cir. 1995) (same principle); *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992) (same); *United States v. Donnes*, 947

[4] The quotation from *Thornton* is accurate but out of context. That case is legally inapposite, as it represents an application of the automobile-search exception to a general rule, elaborated in the following paragraphs of this petition, which bars the non-automobile search involved in this case.

F.2d 1430, 1436 (10th Cir. 1991). The court below appears to have misapprehended the fundamental rule that the plain view doctrine is a warrant-clause exception for *seizures*, not for *searches*.

Evidence obtained as a result of warrantless searches of this kind must be suppressed, unless the government can demonstrate that one of the other "well-delineated exceptions to the warrant requirement" applies. *Horton v. California*, 496 U.S. 128, 141 n.11 (1990) (recognizing that the seizure of a container "does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to a warrant or one of the well-delineated exceptions to the warrant requirement") (citations omitted); *Katz v. United States*, 389 U.S. 347, 357 (1967). As Justice Stevens observed for the majority in *Walter v. United States*, 447 U.S. 649, 657 n.10 (1980), "if probable cause dispensed with the necessity of a warrant, one would never be needed."

The exception to the Fourth Amendment's Warrant Clause most frequently invoked in cases somewhat similar to this one is for automobile searches. See *California v. Acevado*, 500 U.S. 565 (1991) (authorizing warrantless search of closed container found in automobile when there is probable cause to believe contraband is contained in the automobile, regardless of whether justification extends to the particular container). The Seventh Circuit's decision in *Thornton*, 197 F.3d 241, relied on by the panel below, was in fact such a case.[5]

[5] That appeal involved a motion to suppress the results of a warrantless search of a container seized from an automobile during a *Terry* stop. *Id.* at 247, 248.

The doctrine that such evidence may be not only seized when it is in plain view but also searched without a warrant is an extension of the automobile exception, not of the plain view rule, and does not apply in this case. The wrapped packages seized here from the crate were found in petitioner's warehouse, not in the truck.[6] The conclusion of the court below that "*Thornton* clearly authorizes the police activity in this case," Appx. A, at 4 n.2, was therefore profoundly mistaken and requires correction.[7] See, *e.g.*, *Kaupp v. Texas*, 538 U.S. -- (May 5,

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[6] The *per curiam* order of the court below "[a]ssum[es] *arguendo* that Portales had Fourth Amendment standing ...." Appx. A, at 3. The government never argued that he lacked standing, and any such issue was therefore waived. Moreover, the crate was located in petitioner's rented business facility, used for the pallet company he owned. There can be little question that he enjoyed a reasonable expectation of privacy in the contents of containers located on and in his business property, and thus had "standing." See *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978).

[7] Because the decision below rests exclusively on this ground, which is essentially the same error that the district court made, Appx. B (which the government did not even seek to defend on appeal), the court below did not discuss the prior search / controlled delivery doctrine of *Illinois v. Andreas*, 463 U.S. 765 (1983), *see* Appx. A, at 3-4 & n.2 (properly suggesting that application of *Andreas* was not necessarily clear or straightforward, as this case is distinguishable in important respects). The applicability of *Andreas* was the entire subject of the parties' debate on appeal. Upon granting certiorari and summarily reversing, this Court should remand with directions to reach that fact-bound issue rather than address the matter itself. Nothing advanced by the government below established,

2003) (per curiam) (summarily reversing egregiously erroneous Fourth Amendment decision).

Probable cause does not justify a warrantless search, only a seizure and an application for a warrant. As a different Seventh Circuit panel noted succintly on another occasion, "a search warrant is required to open a package (other than a package found in a vehicle) and look inside." *United States v. Cardona-Rivera*, 904 F.2d 1149, 1155 (7th Cir. 1990).[8] The court of appeals' "Order" in this case squarely holds the opposite. The decision is therefore contrary to basic Fourth Amendment doctrine, as expressed by this Court.

_____(cont'd)
as would be necessary under *Andreas*, how the agents could have known that the packages they saw through the cracks in the crates in the warehouse were the same packages discovered in the truck in Missouri. These packages were not uniquely designed; they were of a common style in the Mexican drug trade, according to Agent Rodriguez. CA7 App. 93. This may have contributed to the probable cause, but -- coupled with the lack of markings -- it defeated the claimed authority to search without a warrant.

[8] There is another exception, for a form of wrapping or other container whose characteristics proclaim its contents unambiguously (see, *e.g.*, *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979)), but that exception does not apply to a brick or similar package of drugs wrapped in paper, as here. *Robbins v. California*, 453 U.S. 420, 427-28 (1981) (plurality opinion) (rejecting argument that packages wrapped in green opaque plastic were plain view containers, because an experienced observers could have inferred that they contained marijuana). See also *Walter v. United States*, 447 U.S. at 658-59 (descriptive titles on boxes of obscene films did not eliminate reasonable expectation of privacy).

For these reasons, the Court should grant the requested writ of certiorari and reverse the judgment of the court below.

CONCLUSION

For the foregoing reasons, petitioner RAMON PORTALES prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

Respectfully submitted,
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May 6, 2003.

APPENDIX A

50 Fed.Appx. 87, 2002 WL 31424654

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued October 31, 2002

Decided November 22, 2002

Before

Hon. Kenneth F. Ripple, *Chief Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 01-4001

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

United States of America

Plaintiff-Appellee,

v.

Ramon Portales,

Defendant-Appellant.

No. 99 CR 46-2

Robert W. Gettleman, Judge.

ORDER

**1 After a bench trial, the district court found Ramon Portales guilty of conspiring to possess with intent to distribute marijuana in violation of 21 U.S.C.

§ 846 and possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). The district court then sentenced Portales to the mandatory minimum imprisonment *291 of ten years. Portales appeals the district court's denial of: his motion to suppress physical evidence; a sentencing reduction under the "safety valve" of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2; and a sentencing reduction under U.S.S.G. § 3B1.2 for being a minor participant. For the reasons set forth below, we affirm.

I. Background

At all times relevant to this litigation, Ramon Portales operated the warehouse of the RPI Pallet Company in Monee, Illinois ("RPI") and a farm in Manhattan, Illinois. On at least four occasions in the late 1990's, Portales successfully allowed drug traffickers to use the farm to offload trucks containing marijuana. The traffickers then distributed the marijuana within the Chicago area. Their luck ran out when, during a commercial vehicle inspection in January 1999, the Missouri Highway Patrol discovered that one of the trucks on its way to Portales's farm contained both limes and, in a hidden compartment, bundles of marijuana wrapped in colored paper. A Highway Patrol officer unwrapped one of the bundles, confirmed that it contained marijuana, and then re-wrapped the bundle, put it back in the secret compartment, and re-sealed the compartment. The traffickers driving the truck promptly agreed to assist authorities in a controlled delivery of the marijuana (presumably in exchange for leniency), and then proceeded to Illinois with police to deliver the marijuana to Portales's farm. When the

truck reached the Chicago area, the United States Drug Enforcement Agency ("DEA") took over supervision of the controlled delivery.

As the truck drivers approached their destination, they called co-conspirators and learned that this particular shipment was to be unloaded at RPI instead of the farm. DEA agents watched the truck without interruption as, and after, it arrived at RPI on January 25. During the morning of January 26, 1999, DEA agents observed various people unload stacks of pallets from the truck to the loading docks for several hours. At about 11:25 a.m., police saw a co-conspirator enter the trailer with an orange extension cord. Then at roughly 1:50 p.m., the co-conspirator returned with a truck, towing a horse trailer. Believing that the conspirators were about to leave with the marijuana in the horse trailer, the DEA agents moved in.

In the warehouse, the agents saw, inter alia, crates filled with visible block-shaped bundles wrapped in colored paper. As Portales admits, "from their smell and shape, the agents believed [the bundles] contained marijuana." Without a warrant, the agents opened some of the bundles and confirmed that the bundles contained marijuana. Portales was then arrested and, as discussed above, convicted of conspiring to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846 and possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1).

**2 Portales raises three issues on appeal: (1) whether the district court erred in denying his motion to suppress physical evidence of the marijuana; (2) whether the district court committed clear error in denying Portales a sentencing reduction under the

"safety valve" of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2; and (3) whether the district court erred in denying Portales a sentencing reduction under U.S.S.G. § 3B1.2 for being a minor participant.

II. Discussion

A. Denial of Portales's Motion to Suppress

The sole issue on appeal regarding the motion to suppress is whether the agents violated Portales's rights under the Fourth ***292** Amendment by opening the wrapped bundles of marijuana without a warrant.[1] The Fourth Amendment to the Constitution guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" by the federal government. U.S. Const. amend. IV. A defendant seeking to suppress evidence because of a violation of the Fourth Amendment must first establish that he has standing to challenge the search or seizure. *United States v. Sweeney*, 688 F.2d 1131, 1143 (7th Cir. 1982). Specifically, the defendant must demonstrate that (1) he manifested a subjective expectation of privacy in the object of the challenged search, and (2) society is prepared to recognize that expectation as reasonable. *United States v. Myers*, 46 F.3d 668, 669 (7th Cir. 1995).

Once the defendant has established standing in a case in which law enforcement did not conduct a search

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[1] Portales admits that the agents' entry into RPI was lawful, that the agents were entitled to seize any contraband that was in plain view, and that the bundles wrapped in colored paper were in plain view.

pursuant to a validly issued warrant, the burden of proof shifts to the government, because warrantless searches are "per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The prosecution bears the burden of establishing by a preponderance of the evidence that an exception to the warrant requirement applies. *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000). We review for clear error a district court's findings of fact in a suppression hearing. *United States v. Meyer*, 157 F.3d 1067, 1079 (7th Cir. 1998). We review *de novo* a district court's conclusions of law and mixed questions of law and fact. *Id.*

Without discussing the issue of standing, the district court held that the warrantless seizure of marijuana did not violate the Fourth Amendment because: (1) the agents had probable cause to enter the warehouse to arrest the traffickers, and the bundles of colored paper were in the agents' plain view after they did so; and (2) exigent circumstances justified the search and seizure once the horse trailer was backed up to the pallet company. Assuming *arguendo* that Portales had Fourth Amendment standing, we affirm the court below because where police conclude, based on a "practical, nontechnical probability," that a package in plain view contains illegal drugs, they may seize and open that package without a warrant. *United States v. Thornton*, 197 F.3d 241, 249 (7th Cir. 1999); *see also Illinois v. Andreas*, 463 U.S. 765, 771-72, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983) (discussing the controlled-delivery

variation of the plain view doctrine).[2] Here, the DEA agents knew that there was a practical, nontechnical probability that the bundles wrapped in colored paper contained marijuana: The Missouri Highway Patrol had discovered, and informed the DEA agents, that at least one of the bundles wrapped in colored paper held marijuana and, as Portales admits, the agents smelled the odor of marijuana emanating from the packages. The district court was thus correct when it concluded that the warrantless search of the bundles did not violate the *293 Fourth Amendment. Because we affirm on that ground, we need not address the district court's conclusion that exigent circumstances justified the search.

B. Denial of a Sentencing Reduction under the "Safety Valve" of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2

**3 Under §§ 3553(f) and 5C1.2, a district court may sentence a defendant below the statutory minimum sentence if, *inter alia*, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan ..." *United States v. Marin*,

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[2] *Andreas* involved a controlled delivery of one container, whereas in this case the controlled delivery was of numerous packages identical to the one the police opened. The agents' search of the packages likely qualifies as a controlled delivery under *Andreas*. Because *Thornton* clearly authorizes the police activity in this case, however, we need not further analyze the issue under *Andreas*.

144 F.3d 1085, 1091 (7th Cir. 1998) (quotation omitted). In other words, after meeting other requirements not at issue here, to qualify for the safety valve, a defendant must provide the government with all truthful information he has concerning his offense and related offenses. *United States v. Arrington*, 73 F.3d 144, 149 (7th Cir. 1996). We review a district court's ruling on whether to grant a downward departure under the safety valve of §§ 3553(f) and 5C1.2 for clear error. *United States v. Martinez*, 301 F.3d 860, 866 (7th Cir. 2002).

In this case, the district court refused to apply the "safety valve" because Portales falsely testified as to his innocence and did not come forward to give any additional information he had before the day of sentencing. As the government also points out, Portales continued to assert his innocence after conviction, telling a probation officer that "the judge found me guilty, but I am not."

Portales argues that the reasons the district court gave for denying the downward departure were inadequate. We disagree. Where, as here, a defendant continuously and falsely denies his guilt, it is not clear error for the district judge to find that defendant incredible and thus infer that the defendant has not provided the government with all truthful information he has concerning his offense and related offenses. *See United States v. O'Dell*, 204 F.3d 829, 838 (8th Cir. 2000) (affirming a denial of a sentence reduction under §§ 3553(f) and 5C1.2).

C. Denial of a Sentencing Reduction under U.S.S.G. § 3B1.2 for Being a Minor Participant

Portales's final argument is that the district court erred in denying him a sentencing reduction under

U.S.S.G. § 3B1.2(b), a provision of the Guidelines that requires a district court to reduce a defendant's sentence by two levels if it finds that he were a minor participant in the crime. *See United States v. Isienyi*, 207 F.3d 390, 392 (7th Cir. 2000). Because we reject Portales's argument as to the safety valve, however, we need not reach this issue. Without application of the safety valve, Portales's ten-year sentence is the mandatory minimum and no reduction below that term of incarceration is available under § 3B1.2(b). *See United States v. Ivory*, 11 F.3d 1411, 1413 (7th Cir. 1993).

III. Conclusion

For the reasons set forth above, we affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	No. 99 CR 46
vs.	)	Chicago, Illinois
	)	February 7, 2000
RAMON PORTALES, Defendant.	)	10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION

BEFORE
THE HONORABLE ROBERT W. GETTLEMAN

[2]
(Proceedings in open court.)
THE CLERK: 99 CR 46, United States versus Ramon Portales.
* * * *
[42]
THE COURT: First of all, I want to thank both Mr. Shalgos and Mr. Reinberg for an exceptionally well presented case, better than most, much better. I really do appreciate that. And you don't know how much I appreciate that. It was logically presented and well done on both sides.

Okay. Let's figure out what the facts are here, first of all. The agents knew that the truck had a secret compartment with a large quantity of marijuana on it. They were told originally from the cooperating witnesses that the marijuana was [43] in large cinderblock-sized blocks wrapped in paper. So they pretty much knew what they were dealing with, even though Agent Rodriguez hadn't actually seen it until he saw it in the warehouse.

They knew that the truck was generally unloaded at a farm and that it was going to be unloaded at the farm, at least they believed it when they started the operation the next day.

They then learned that the farm was flooded or that the road to the barn was flooded, although I do note that it was winter out, and it was obviously pretty cold, because there was a lot of snow piled up, and one has to wonder how frozen the ground might have been. But that's what they said. So let's assume it was flooded, and that they wouldn't be able to unload it at the farm at least at that time.

There is obviously a legitimate point of contention here about whether they knew it was going to be unloaded at the warehouse or not. The most contemporaneous note of that is the Exhibit E that we talked about in which Mr. Lugo said it would be unloaded but not where it would be unloaded. And for all I can tell, the people doing the unloading may not have known at the time on the day before when those conversations occurred where it would be unloaded. It's possible obviously that the creek could have subsided or the ground froze sufficiently to unload it at the farm or that they were going to unload it somewhere other than the warehouse, where in the past all they [44] had

unloaded was the legitimate cargo and not the contraband.

That would sort of argue that they didn't, they weren't used to unloading it and didn't intend to unload it at the warehouse, which, regardless of how public it is, it was the type of commercial business that somebody could have walked into, I suppose, and there would be all kinds of reasons not to want to unload contraband at that place. There was at least some deliveries of propane to the warehouse. And I assume that if I pulled up in a truck wanting to sell pallets, they would have been hard pressed to stop me from pulling up and unloading my pallets or going in and looking at the pallets they had to see if I wanted to buy some. So there would be all kinds of reasons not to unload it there.

And I credit the agent's testimony that he didn't know, Agent Rodriguez didn't know that it was going to be unloaded at the warehouse at the time they started their surveillance and into the next day.

I also conclude that this wasn't the type of private establishment, and I think Mr. Reinberg had a good analogy, it's not like Marshall Field's where the public is going in and out at all times, and anybody can just sort of go in and fade into the woodwork. But it is the kind of place, as I just mentioned, that invites the public, they had a sign out in front, "We buy and sell new and used pallets," that invites members of the public, at least people in the pallet business to come in. So [45] it doesn't, it doesn't rise to a dwelling obviously, and it's not as public as Marshall Field's. It's somewhere in between. But it is certainly open to the public.

So they watch the truck pull up to the loading dock. They know that there is marijuana in it, and they know

there is a fairly large quantity of marijuana, and they know there is limes, and that they see the limes being unloaded.

Yes, Mr. Shalgos is right that it appears that they knew there were approximately 20 pallets of limes, and they see those pallets being unloaded. Whether every single pallet of limes was unloaded or just about every single pallet doesn't really seem to make much of a difference to me, because when the 20 pallets were unloaded, they knew that all or just about all of the limes had been unloaded at that time.

Whether there was one or, you know, two pallets left doesn't seem to be particularly important, because with all but a few pallets of limes unloaded, obviously, the way would have been clear to the front of the truck to access the secret compartment, and that was really as important a fact as anything else.

Mr. Shalgos I think very cleverly, I mean that as a compliment, poses some other possibilities about these crates going onto the truck. Maybe they were loading some pallets of limes that had fallen over or something like that into these crates. Why you would need three huge crates like this to do [46] that though is sort of a mystery to me, and I cannot say that it would be reasonable to believe that these big crates were being loaded onto the trailer by Mr. Portales to pick up some left over limes that might have fallen. You wouldn't have needed three large crates. In fact, these crates were much more suited in size to loading or unloading the marijuana.

Mr. Shalgos also says, well, maybe they were loading more pot. But they knew that the truck was being unloaded. To say that they would be loading more

contraband onto the truck would have been contrary to the information that they had. It would have made no sense at all to reach that conclusion.

I think the only conclusion any reasonable person would have believed when they saw the crates go on the truck with the power cord that could be used to operate a power tool to access the secret compartment and then to be taken off the truck again by Mr. Portales, off the trailer by Mr. Portales, the only reasonable conclusion you could reach is that the marijuana had been unloaded from the trailer and the secret compartment in the trailer into the warehouse.

At this point, given what I've already said about the nature of the establishment and the knowledge of the agents, I think they had probable cause to go into the warehouse and make the arrest.

The government also alleges as we know that there were exigent circumstances that arose when the horse trailer was [47] backed up. I think again the only reasonable conclusion you could reach is why you would back up a horse trailer into a pallet company? I mean, I don't think people use horse trailers to load pallets. I suppose they could. But horse trailers are usually used to transport horses. And we didn't hear a word about any horses. But horses are an animal that is often found on a farm. So, you know, putting the connection with the ultimate original destination of the contraband and the horse trailer, I think one could assume that it was being used in a pinch to unload and transport out of the control of the agents the contraband.

And I think Mr. Reinberg is right to say that when the contraband was unloaded from the trailer, the agents who until then had some control over it were losing that

control rather quickly. And I think they had reason to believe that the time to make the arrest had arrived. I would think that that might not have been an easy decision to make from a law enforcement viewpoint, because I'm sure somebody might have been tempted to follow that trailer and see where it was going and maybe get even some more people who were involved in this thing. And I think the only reason that they made that decision was to maintain control of a rather large quantity of drugs and not to risk losing it. And I don't think that it was unreasonable to make that decision. So at that point, I believe they had probable cause to go into the warehouse and make the arrest.

[48] Now comes the more interesting part of the case in a way, and that is, what did they see when they were in there. There is conflicting evidence as to whether there were tops on these crates. Obviously, the only evidence I have is that the money was in plain view. And the money itself obviously could be seized, and I don't think Mr. Shalgos is saying anything other than that.

I might say at that point that if nothing else had been seized at that stage except for the money, there might be an interesting question of whether they could have gone and taken the forklift and the truck.

So I think the real question is whether the marijuana was in plain view. Remember, they knew how it was packaged. These are experienced agents. And I'm assuming that they didn't smell it. You know, that's the one flaw I find in Mr. Reinberg's presentation is that he forgot to ask the question. It's happened to all of us.

So assume all we are looking at here is or all I'm examining is whether it was in plain view sight. I have

studied the photographs both at the hearing we had on Friday and this morning. I reviewed the video a number of times. And I've read my notes, which I took quite carefully of the agents' testimony. And I have to conclude that they were in plain view, that the contraband was in plain view.

The crates themselves, even if they had tops on them [49] that you couldn't see over, and that's a real question in my mind, the agent said he could see over them, those tops were not exactly airtight container tops. They were pretty sloppy. They were pieces of cardboard and irregularly shaped plywood. And it is quite likely that you could see around them even from the top.

But you don't have to get that far, because you could easily see what was in these crates or at least some of these crates through the gaps that appeared on the corners. It should be noted if anybody is ever going to read this without the exhibits, which I would advise against, that these crates, Mr. Reinberg said they're not works of art, that's the kindest thing you could say about them. They're just sort of slapped together pieces of cardboard and plywood on the sides as well as the tops with it looks like one-by-fours nailed to the pallets and randomly almost nailed to some of the sides of these crates. There are many areas in the crates that you could see the contents or through which you could see the contents.

In the middle crate, for example, there is a huge gap on the left corner as I'm looking at the picture that would be a place where you could see the contents of that crate even if a top were on it.

On the one to the far right, there is a huge gap on the left corner from the top to the bottom. There would be no way you couldn't see what was in those crates.

[50] And not only are the agents trained and have experience with this type of contraband the way it was packaged, they were told the way this contraband was packaged originally.

So my holding was that this was in plain view and, therefore, that the seizure was proper.

The forklift obviously was observed being used in the commission of the loading and unloading or the loading of the crates, the unloading of the contraband. The truck was being used to spirit it away if they had gotten that far. And so the agents believed, as he stated, that these were forfeitable assets and, therefore, searchable at will was grounded in reason and probable cause. So those vehicles were properly seized and searched and their contents properly searched and seized as well.

So the motion to suppress is denied for those reasons.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
February 5, 2003

Before
Hon. Kenneth F. Ripple, *Chief Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 01-4001

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

United States of America
Plaintiff-Appellee,
No. 99 CR 46-2

v.

Robert W. Gettleman, Judge.

Ramon Portales,
Defendant-Appellant.

ORDER

On consideration of the petition for rehearing and suggestion [sic] for rehearing en banc [sic] filed by defendant-appellant, no judge in active service has requested a vote on the petition for rehearing *en banc*, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

(2)

FILED
JUL 9 2003
OFFICE OF THE CLERK

No. 02-1631

In the Supreme Court of the United States

RAMON PORTALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 11

QUESTION PRESENTED

Whether federal agents violated petitioner's Fourth Amendment rights when, after making a controlled delivery of marijuana to petitioner's warehouse and without obtaining a search warrant, they unwrapped bundles in the warehouse that smelled of marijuana and were packaged like the marijuana in the controlled delivery.

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In the Supreme Court of the United States

No. 02-1631

RAMON PORTALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter, but is reprinted at 52 Fed. Appx. 290. The oral decision of the district court denying petitioner's motion to suppress (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2002. A petition for rehearing was denied on February 5, 2003 (Pet. App. C1). The petition for a writ of certiorari was filed on May 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to ten years' imprisonment, to be followed by a five-year term of supervised release, and fined $5000. The court of appeals affirmed in an unpublished order. Pet. App. A1-A2; Pet. 4.

1. Petitioner was a farmer and operated a pallet warehouse in Illinois. In 1999, during a commercial vehicle inspection, officers of the Missouri Highway Patrol found bundles of marijuana, wrapped in colored paper, hidden in a secret compartment in a truck carrying limes. The officers unwrapped one of the bundles, confirmed that it contained marijuana, re-wrapped it, returned it to the secret compartment, and resealed the compartment. The occupants of the truck agreed to assist authorities in making a controlled delivery of the marijuana to its intended destination, which was petitioner's farm in Illinois. Pet. App. A2.

When the occupants of the truck neared petitioner's farm, they were instructed by telephone to deliver the drugs to petitioner's warehouse, instead of his farm. Agents of the Drug Enforcement Agency (DEA) observed the truck's arrival at the warehouse and the unloading of pallets from the truck to the warehouse. The agents then saw three large crates being moved onto the truck and an individual take an extension cord into the back of the truck. Approximately an hour and a half later, the same individual brought another truck and a horse trailer to the warehouse. Believing that the

marijuana had been removed from the secret compartment and taken off of the truck in the crates, and was about to be loaded onto the horse trailer for shipment to another location such as petitioner's farm, the DEA agents entered the warehouse to make arrests. Pet. App. A3, B4-B5.

In the warehouse, the agents saw crates in which there were visible, block-shaped bundles wrapped in colored paper. From the smell of the bundles and their wrapping, the agents believed that, like the bundle that had been inspected in Missouri, they contained marijuana. Without obtaining a warrant, the agents opened some of the bundles and discovered marijuana. Petitioner was arrested at the warehouse. Pet. App. A3, B7-B8.

2. Before his trial, petitioner moved to suppress the marijuana seized from the warehouse, arguing in relevant part that the officers conducted a search in violation of the Fourth Amendment when they opened bundles in the warehouse without a warrant. The district court denied the motion to suppress. Pet. App. B1-B8. It determined that the agents had probable cause to believe that the marijuana concealed in the truck had been unloaded into the crates, which were then moved into the warehouse. *Id.* at B4-B5. The court further concluded that, after the horse trailer was backed up to the loading dock, exigent circumstances justified the agents' immediate entry into the warehouse to prevent the marijuana from being taken away. *Id.* at B5-B6. Finally, the court determined that after the agents lawfully entered the warehouse, they saw the bundles in plain view, and that the packaging of the bundles was consistent with a shipment of marijuana and with the particular marijuana inspected in Missouri. *Id.* at B7-B8. For those reasons, the court

concluded that the agents had probable cause to believe that the bundles "were forfeitable assets and, therefore, searchable at will." *Id.* at B8.

3. On appeal, petitioner conceded that the DEA agents' entry into the warehouse was lawful, and that the agents were entitled to seize the bundles that they observed in plain view. Pet. App. A4 n.1. Petitioner contended, however, that the agents violated his Fourth Amendment rights when they opened the wrapped bundles without a search warrant.[1]

The court of appeals assumed without deciding that petitioner was entitled to raise his Fourth Amendment claim, Pet. App. A5, and concluded that the agents' search of the bundles did not violate the Constitution, *id.* at A5-A6. The court relied on its earlier decision in *United States* v. *Thornton*, 197 F.3d 241 (7th Cir. 1999), cert. denied, 529 U.S. 1010 and 1022 (2000), which stated in the context of the discovery of a package in an automobile that, when police officers are aware of a "practical, nontechnical probability" that a package in plain view contains illegal drugs, they may seize and open the package without a warrant. *Id.* at 249. The court determined that such a "practical, nontechnical probability" existed in this case, because "[t]he Missouri Highway Patrol had discovered, and informed the DEA agents, that at least one of the bundles wrapped in colored paper held marijuana and, as [petitioner] admits, the agents smelled the odor of marijuana emanating from the packages." Pet. App. A6. Having affirmed the district court on that basis, the court of appeals determined that it was unnecessary to consider

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[1] Petitioner also raised sentencing issues in the court of appeals that are not at issue in this Court. See Pet. App. A6-A8.

whether the opening of the bundles also was justified by exigent circumstances. *Ibid.*

ARGUMENT

Petitioner renews in this Court his argument that the federal agents violated his Fourth Amendment rights when they made a warrantless opening of bundles of marijuana that the officers saw in the warehouse. As a general rule, law enforcement officers are required to obtain a search warrant before opening a closed container or package. See *United States* v. *Jacobsen*, 466 U.S. 109, 114 (1984); *United States* v. *Place*, 462 U.S. 696, 701 (1983). Cf., *e.g.*, *California* v. *Acevedo*, 500 U.S. 565 (1991) (permitting warrantless searches, upon probable cause, of containers found in automobiles). In this case, however, the warrantless search was consistent with the Fourth Amendment because the smell of marijuana, together with the Missouri Highway Patrol's earlier discovery of marijuana in one of the bundles in the truck, sufficiently established the contents of the bundles in the warehouse. The unpublished opinion of the court of appeals therefore does not warrant the Court's review.

1. Under the Fourth Amendment, "certain containers may not support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *United States* v. *Johns*, 469 U.S. 478, 486 (1985). For example, the "distinctive configuration" of a package, or the transparency of a container, may "proclaim[] its contents." *Robbins* v. *California*, 453 U.S. 420, 427 (1981) (opinion of Stewart, J.); see *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979). In such a case, a search does not intrude upon any privacy interest protected by the Fourth Amendment, because the contents of the container "cannot

fairly be said to have been removed from a searching officer's view" before the search. *Robbins*, 453 U.S. at 427 (opinion of Stewart, J.).

In *Johns*, this Court, after noting the principle that containers that proclaim their contents are not protected by a legitimate expectation of privacy, stated that it is "debatable" whether an expectation of privacy attaches to a package "reeking of marihuana" and, therefore, whether a warrantless search would be permissible on the basis of the package's "plain odor." 469 U.S. at 486; cf. *id.* at 489 (Brennan, J., dissenting) (criticizing majority for "suggest[ing] a very definite view" that such a warrantless search would be permissible). Several courts of appeals have concluded that a warrantless search is permissible in that situation. See *United States* v. *Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987) ("[N]o reasonable expectation of privacy attaches to containers whose contents are readily discernible through use of some sense other than sight."); *United States* v. *Lueck*, 678 F.2d 895, 903 (11th Cir. 1982); *United States* v. *Haley*, 669 F.2d 201, 203-204 & n.3 (4th Cir.), cert. denied, 457 U.S. 1117 (1982). We are unaware of any court of appeals decision after *Johns* that adopts the opposite view.[2]

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[2] In its own decision in *United States* v. *Johns*, the Ninth Circuit rejected the view that an odor of marijuana emanating from a package obviates the need for a warrant. 707 F.2d 1093, 1095-1096 (1983). Shortly after this Court's decision in *Johns*, however, the Ninth Circuit suggested that the warrantless search of a plastic bag might have been valid if the bag had "a distinctive * * * odor that identified its contents." *United States* v. *Miller*, 769 F.2d 554, 560 (9th Cir. 1985). *United States* v. *Dien*, 609 F.2d 1038 (1979), modified, 615 F.2d 10 (2d Cir. 1980), which is a pre-*Johns* decision, has been cited as rejecting the "plain odor" doctrine. See, *e.g.*, *Johns*, 469 U.S. at 489 (Brennan, J., dissenting). There, however,

In this case, a federal agent testified at petitioner's trial that he smelled the odor of marijuana emanating from the wrapped bundles in the warehouse. C.A. App. 231.[3] Petitioner agreed in the court of appeals that the bundles smelled of marijuana. See Pet. App. A3. Under the circumstances, petitioner had no reasonable expectation of privacy in the bundles, and the agents acted within their constitutional authority in unwrapping some of the bundles without a search warrant.[4]

2. The judgment below also is correct under *Illinois* v. *Andreas*, 463 U.S. 765 (1983). In *Andreas*, the Court concluded that the defendant had no cognizable privacy interest in a container after government agents lawfully opened it and identified its contents as contraband. Therefore, the Court determined that absent a substantial likelihood that the contents of the container were changed after the initial opening by the agents, the agents' reopening of the container following a controlled delivery did not violate the defendant's Fourth Amendment rights. *Id.* at 769-773.

Petitioner argues (Pet. 12-13 n.7) that *Andreas* is inapposite because the agents in this case could not have been certain that the bundles they saw in the ware-

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the Second Circuit concluded that the odor of marijuana might not have come from the cartons that were searched. 609 F.2d at 1045.

[3] Although the government did not show at the suppression hearing that the bundles smelled of marijuana, see Pet. App. B6, the court of appeals correctly considered the trial evidence when determining that the search was valid. See *Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

[4] Because both the district court and the court of appeals rejected petitioner's claim that the opening of the bundles violated the Fourth Amendment, neither had any occasion to consider the possible significance of the fact that the agents opened only some of the bundles at the warehouse.

house were the same ones that the Missouri Highway Patrol had discovered in the truck. The district court, however, determined that the facts available to the DEA agents would have led "any reasonable person" to conclude that the marijuana bundles were removed from their hiding place in the truck and taken into the warehouse in crates. Pet. App. B5. Further supporting that conclusion, the bundles in the warehouse smelled of marijuana and were wrapped in the same way as the marijuana bundles in the truck. See *id.* at A6. Under the circumstances, the agents could reasonably conclude that the bundles in the warehouse came from the truck. In fact, although the court of appeals deemed it unnecessary to apply *Andreas* because it rejected petitioner's Fourth Amendment argument on other grounds, it noted that "[t]he agents' search of the packages likely qualifies as a controlled delivery under *Andreas*." *Id.* at A6 n.2.

3. Petitioner's suggestion (Pet. 10-11) that the court of appeals' unpublished decision in this case conflicts with decisions of other courts of appeals is incorrect. In the cases on which petitioner relies, the courts applied the general rule that a closed container, although properly seized by law enforcement officers, may not be opened without a search warrant. See *United States* v. *Doe*, 61 F.3d 107, 110-111 (1st Cir. 1995); *United States* v. *Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992); *United States* v. *Donnes*, 947 F.2d 1430, 1436-1437 (10th Cir. 1991). None of those cases involved a situation in which the odor or some other characteristic of the container revealed its contents, or in which the container was reopened following a controlled delivery. Furthermore, the unpublished decision of the court of appeals in this case lacks precedential value under Seventh Circuit

Rule 53(b)(2)(iv), see Pet. App. A1, and it therefore cannot create a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2003

AUG 13 2003
OFFICE OF THE CLERK

(3)

No. 02-1631

IN THE
SUPREME COURT OF THE UNITED STATES

RAMON PORTALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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August 2003

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Illinois v. Andreas, 463 U.S. 765 (1983) 1, 3, 4
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United States v. Longmire, 761 F.2d 411 (7th Cir. 1985) 2

Constitution, Statutes and Rules:

U.S. Const., amend. IV 1, 3
LAR 53(b) (7th Cir.) 1

ARGUMENT IN REPLY

Ramon Portales has petitioned this Court for a writ of certiorari to review the judgment and opinion of the Seventh Circuit. The court below upheld the denial of petitioner's pretrial motion to suppress evidence on an indefensible basis -- that probable cause to believe an opaque package contains drugs is enough to justify a warrantless search of that package, simply because the package itself was seized in plain view. The respondent does not deny that this Court's cases, as consistently announced over the past 20 years and more, hold the opposite. Instead, the Brief in Opposition argues that certiorari should be denied because the "petitioner had no expectation of privacy in the bundles," which, according to a federal agent who testified at trial, "smelled ... of marijuana." Br.Opp. 7. The respondent also argues that certiorari should be denied, because in its view "[t]he judgment below is also correct under *Illinois v. Andreas*, 463 U.S. 765 (1983)." Br.Opp. 7. Finally, the respondent argues that the Seventh Circuit's unpublished decision creates no circuit conflict, even though it is at odds with the published opinions of other courts of appeals, because it "lacks precedential value under Seventh Circuit Rule 53(b)(2)(iv)." Br.Opp. 9.

While an nonprecedential opinion may not create a formal circuit conflict, this Court should nevertheless grant certiorari to correct a lower court decision which flouts this Court's established Fourth Amendment jurisprudence. The respondent's arguments do not undermine this reason to grant the writ.

1. Contested trial testimony concerning the odor emanating from the wrapped bundles neither reduced the petitioner's expectation of privacy nor diminished the seriousness of the Fourth Amendment violation.

There was testimony at trial that the crates containing the wrapped bundles smelled of marijuana, CA7 App. 231. Because no such testimony was elicited at the suppression hearing, however, the district court "assum[ed] that [the agents] didn't smell it." Pet. App. B6. While an appellate court may consider testimony introduced at trial in determining the validity of a search, *Carroll v. United States*, 267 U.S. 132, 162 (1925), the court of appeals in this case did not affirm the denial of the suppression motion based on the "plain odor" trial testimony. Under Seventh Circuit law, the court of appeals was not required to consider such testimony where, as here, the testimony was contested at trial,[1] the district court did not credit the testimony, and the jury's verdict is not dependent on the jury's crediting the testimony. *United States v. Longmire*, 761 F.2d 411, 418 (7th Cir. 1985).

Because there is no evidence that any lower court credited the odor testimony elicited at trial, the respondent is not entitled to treat that contested "fact" as established of purposes of appeal. Accordingly, the respondent's argument does not demonstrate that the petitioner lacked a reasonable expectation of privacy sufficient to

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[1] See CA7 App. 226, 233, 237 (challenging credibility of odor testimony).

justify a warrantless search of the opaque packages.[2] This Court should grant the writ to correct the court of appeals' disregard of established Fourth Amendment jurisprudence.

2. This case does not so clearly fit within the *Andreas* exception to the warrant requirement as to justify a denial of certiorari on that basis.

The respondent also argues that the writ should not be granted, because "[t]he judgment below is also correct under *Illinois v. Andreas*, 463 U.S. 765 (1983)." Br.Opp. 7. This Court held in *Andreas* that a defendant has no further privacy interest in a closed container once government agents have already lawfully opened it and determined that it contains contraband. *Andreas* does not apply under the facts of this case, because the record does not establish that the "containers" the agents searched (*i.e.*, the wrapped bundles found in crates in the warehouse) were the same "containers" that had been "previously opened under lawful authority" at the weigh station in Missouri.

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[2] In any event, even if the facts of this case established, as the respondent argues, that the odor of the wrapped bundles betrayed their contents, Br.Opp. 7, that would be a reason to *grant* the writ -- not to deny it. This Court has never established a "plain odor" exception to the warrant requirement. In *United States v. Johns*, 469 U.S. 478, 486 (1985), the Court expressly declined to decide the question. Should the Court believe that the facts and record of this case are sufficient to support such an argument, it should grant the writ and decide this important issue.

In this case, the government advanced an *Andreas* argument only in a footnote to its post-hearing brief in the district court. The district court did not address that theory, much less rest its decision upon it. The government then relied principally upon *Andreas* in the court of appeals, but once again the court did not rule on that basis. The facts of this case reveal why both courts below wisely steered clear of the *Andreas* theory.

Only one of the paper-wrapped bundles had been lawfully opened by law-enforcement officials when the truck was first stopped. Thus, no more than one of those bundles *could* have come within the *Andreas* exception. The district court never found that *that* bundle was actually searched later at the warehouse. All it found was that the previously searched marijuana had been unloaded from the truck and taken to the warehouse. Pet. App. B5. Because no government agent marked the previously-opened bundle for identification prior to the truck's pulling up to the loading dock at Mr. Portales's warehouse, there was no way to tell whether the agents actually opened the bundle that had previously been searched. Under *Andreas*, the fact that the agents lawfully searched *one* of the bundles removed the reasonableness of any expectation of privacy the petitioner had with respect to *that* bundle -- but not to the remainder of the packages.

While the agents may have had probable cause to believe that the *other* bundles *also* contained marijuana, which therefore gave them the authority to *seize* them, this Court's cases indisputably establish that probable cause alone did not allow them to search the bundles without a warrant. For this reason, the lower courts could not have approved the search under *Andreas*.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the petition itself, this Court should grant the petition of Ramon Portales for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

Respectfully submitted,

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